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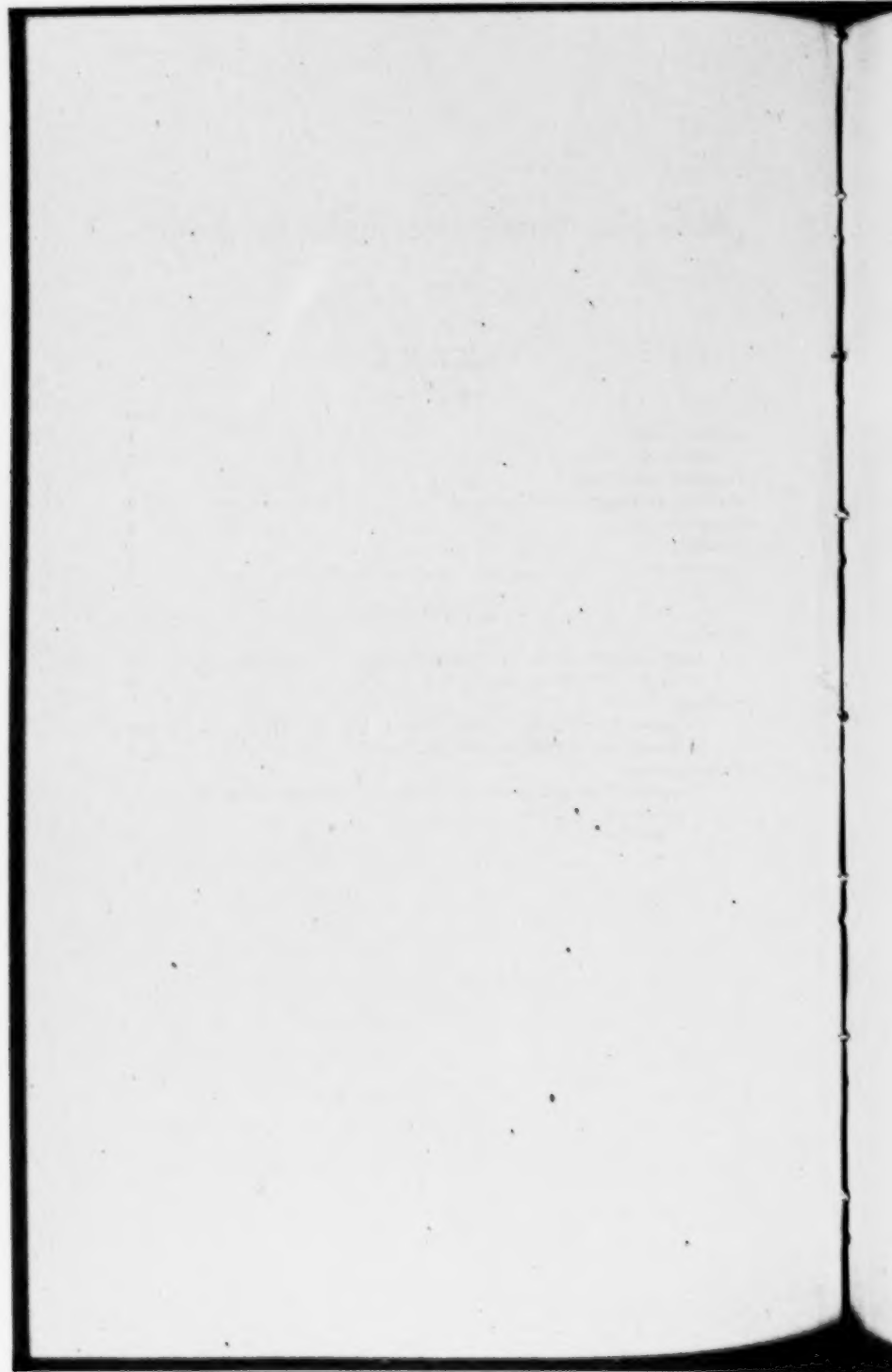
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(1)



# **In the Supreme Court of the United States**

OCTOBER TERM, 1946

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No. 863

WHITMAN PUBLISHING COMPANY, PETITIONER

v.

THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT  
OF CLAIMS

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## **OPINION BELOW**

The opinion of the Court of Claims (R. 16-18) is reported in 65 F. Supp. 487.

## **JURISDICTION**

The judgment of the Court of Claims was entered on May 6, 1946 (R. 18-19). On July 2, 1946, the petitioner filed a motion for a new trial which was overruled on October 7, 1946 (R. 19). The petition for a writ of certiorari was filed on January 7, 1947. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

## QUESTION PRESENTED

Whether the evidence supports the finding of the Court of Claims that certain products manufactured and sold by petitioner are "games or parts of games" subject to tax under Section 609 of the Revenue Act of 1932.

## STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

## SEC. 609. TAX ON SPORTING GOODS.

There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: \* \* \* games and parts of games (except playing cards and children's toys and games); and all similar articles commonly or commercially known as sporting goods.

Revenue Act of 1938, c. 289, 52 Stat. 447:

## SEC. 701. TERMINATION OF CERTAIN EXCISE TAXES.

\* \* \* \* \*

(d) *Sporting Goods*.—The tax imposed by section 609 of the Revenue Act of 1932 shall not apply to articles sold after June 30, 1938.

\* \* \* \* \*

Treasury Regulations 46, promulgated under the Revenue Act of 1932:

ART. 53. *Scope of tax*.—The tax attaches to sales by the manufacturer of the articles enumerated in section 609 as well

as to all similar articles commonly or commercially known as sporting goods, games, and parts of games (except playing cards and children's toys and games).

The term "sporting goods" includes all articles of the same general character as those specifically named, the purpose of which is primarily for use either indoors or outdoors in connection with a game or sport.

The term "game" includes games of skill or chance and every contrivance, device, or combination of articles which is designed to furnish sport, recreation, or amusement. Games of the type ordinarily played or used by adults, as distinguished from games designed for the use of children, are subject to the tax.

ART. 57. *Rate of tax.*—The tax is payable by the manufacturer at the rate of 10 per cent of the sale price as outlined in articles 8 to 15, inclusive.

#### STATEMENT

The special findings of fact of the Court of Claims (R. 5-15) may be summarized as follows:

Petitioner, a corporation, is now and was from July 1, 1934, to June 30, 1938, engaged in the manufacture and sale of books, games, and similar articles. Petitioner's customers consisted primarily of large syndicate chain stores (R. 5).

The excise taxes here in controversy were imposed under Section 609 of the Revenue Act of 1932 by the Commissioner of Internal Revenue

on the sales of certain games manufactured and sold by petitioner during the period July 1934 to June 1938. After the taxes had been paid, the petitioner filed a claim for refund upon the ground that these games were "children's games" which Section 609 expressly excepts. This suit was instituted in the Court of Claims within two years from the rejection of this claim (R. 1, 5-6).

The games involved in this case are known as "Lotto," "Bingo," "Grand National," "National Derby," "Authors," and "Game Implements" (R. 6). These games were made of cheap material, price being a factor taken into consideration in planning them (R. 9). They were displayed for sale on counters devoted to children's toys and similar items (R. 10).

In finding these to be "adult" and not "children's" games, the Court of Claims described them as follows:

"Lotto" and "Bingo" are played by the use of numbered discs which are called off by one person, each player covering this number by a marker if it appears on his numbered chart. The object of the game is to cover all the numbered spaces on any one row on the chart, and the first player to do this wins the game. They are adult games of chance, even though they may be played also by children of average intelligence of 8 or 9 years (R. 10-11).

"Grand National" and "National Derby" are horse racing games. They, too, are adult games even though they may be played by children of average intelligence of the age of 10 and 12 years, respectively (R. 11-12, 15).

"Authors" is a card game designed to acquaint players with the names of authors and their works. It consists of a set of 44 cards, 11 books of 4 cards each. The game is played with the object of obtaining complete books by calling for specific cards from other players. It is an adult game, found the Court of Claims, even though it may be played by children of average intelligence of the age of 10 years (R. 13).

"Game Implements" consists of wooden checkers and markers, a metal arrow spinner on a piece of cardboard, two small wooden dice, and a dice box, assembled in a small cardboard box. It does not constitute a game in itself but may be used in playing various games of chance. The court below found it might be used by children of average intelligence of the age of 11 or 12 years (R. 13).

#### ARGUMENT

The Court of Claims upon consideration of all the evidence, which included the testimony of expert witnesses, concluded that the Commissioner of Internal Revenue was correct in finding that the games here involved were not "children's games" within the exception to the statute. Peti-

tioner contends that this conclusion is in conflict with the evidentiary findings. However, these explicitly include findings that each game was an adult game.<sup>1</sup>

We submit that the decision below raises no questions warranting further review. Games ordinarily played or used by adults are taxable, even though they may also be played by children. *Halsam Products Co. v. United States*, 23 F. Supp. 466 (C. Cls.); Art. 53, Treasury Regulations 46 (quoted, *supra*, p. 2); cf. *Magone v. Wiederer*, 159 U. S. 555, 562.<sup>2</sup>

The case involves no question of importance, and there is no conflict of decision. It may be noted, also, that the tax here involved was repealed by Section 701 of the Revenue Act of 1938 (*supra*, p. 2).

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<sup>1</sup> The court below did not directly so find with respect to "Game Implements." However, it did find that these implements were used to replace lost pieces of games to which the various instrumentalities were related and may be used in playing games of chance (R. 13), and it is implicit in this finding that the implements were parts of adult games. It may be noted also that Section 609 specifically includes checkers and dice.

<sup>2</sup> Petitioner also contends (Br. 10) that the Court of Claims construed the tax as one upon a function rather than upon the manufacture and sale of devices on implements with which games are played. That this contention is insubstantial is evidenced by the fact that the court below held certain other games not to be taxable where the nature of the implements or the character of the games showed they were designed and adapted exclusively for children (R. 17-18).



**CONCLUSION**

The petition for certiorari presents no question warranting review, and should be denied.

Respectfully submitted.

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FEBRUARY 1947.